

ORIGINAL

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 90-489

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

JACK R. DUCKWORTH and
INDIANA ATTORNEY GENERAL,

Petitioners,

v.

WILLIAM E. CRANK,

Respondent.

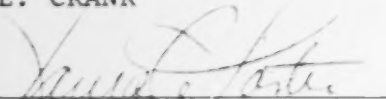
MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

Respondent William E. Crank, through his attorneys, Jenner & Block, requests that this Court grant him leave to proceed in forma pauperis in the above-captioned case. This request is based upon the appointment of Jerold S. Solovy and the law firm of Jenner & Block as counsel to Mr. Crank pursuant to the Criminal Justice Act, 18 U.S.C. § 3006 et seq. A copy of the relevant Order of the United State Court of Appeals for the Seventh Circuit dated October 22, 1990 is attached hereto.

Respectfully submitted,

WILLIAM E. CRANK

By:


Laura A. Kaster

One of His Attorneys

Dated: November 21, 1990

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

October 22, 1990

By the Court:

WILLIAM E. CRANK,)	Appeal from the United
Petitioner-Appellant,)	States District Court for
)	the Northern District of
No. 89-3626)	Indiana, South Bend
vs.)	Division
)	
JACK R. DUCKWORTH, Warden,)	No. 88 C 435
and the ATTORNEY GENERAL OF)	Hon. Allen Sharp,
INDIANA,)	<u>Chief Judge</u>
Respondents-Appellees.)	

This matter comes before the court for its consideration of the "MOTION TO RECONSIDER", filed herein on October 5, 1990, by Ms. Candice Ann Lichtenfels, court-appointed counsel for petitioner-appellant William E. Crank.

Upon consideration thereof

IT IS ORDERED that the Motion To Reconsider is GRANTED, and Ms. Lichtenfels is hereby allowed to withdraw as counsel for petitioner-appellant.

IT IS FURTHER ORDERED that Mr. Jerold Solovy, JENNER & BLOCK, One IBM Plaza, Chicago, Illinois, 60611, is hereby appointed pursuant to the provisions of the Criminal Justice Act to represent petitioner-appellant William E. Crank in the Petition For Writ of Certiorari now pending in the Supreme Court of the United States. (Jack R. Duckworth and Indiana Attorney General, Petitioners vs. William E. Crank, Respondent.) Counsel is directed to contact the petitioner-appellant immediately.

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On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT
WILLIAM E. CRANK

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QUESTION PRESENTED

Whether certiorari should be granted to review the Seventh Circuit's holding when: (a) the Seventh Circuit's decision follows to the letter this Court's ruling in Maleng v. Cook, 109 S. Ct. 1923 (1989), and construes the pro se habeas corpus petition filed in this case as a challenge to the sentence for which Mr. Crank is currently in custody; and (b) Indiana has misconstrued the Seventh Circuit's ruling as a habeas corpus challenge to a conviction for which the sentence already has been served, and asserted a conflict with Maleng v Cook based upon this misconstruction.

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BRIEF IN OPPOSITION FOR RESPONDENT
WILLIAM E. CRANK

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 905 F.2d 1090 (7th Cir. 1990). The opinion of the United States District Court for the Northern District of Indiana is an unreported decision, No. 88 C 435 (October 11, 1989).

STATEMENT OF THE CASE

In July of 1988, Respondent William E. Crank filed a pro se petition for habeas corpus relief under title 28 U.S.C. § 2254 in the United States District Court for the Northern District of Indiana. Mr. Crank's petition challenged his 1974 burglary conviction and its use to enhance the sentence that he received in connection with a 1981 assault conviction. The 1981 sentence was enhanced because the court deemed Mr. Crank a habitual offender, based in part upon his 1974 conviction, and added thirty years to his term. Mr. Crank challenged his 1974 conviction as unconstitutional, asserting that due to the ineffective assistance of counsel he was denied the opportunity to appeal his conviction.

Although Mr. Crank's pro se petition referred to both the 1974 and 1981 convictions, the district court interpreted Mr. Crank's habeas corpus petition as a challenge only to his 1974 conviction. Because Mr. Crank had already served the full sentence for the 1974 conviction and was no longer in custody pursuant to that conviction, the district court ruled that it lacked subject matter jurisdiction to hear Mr. Crank's habeas corpus petition.

The Seventh Circuit reversed. Applying to the letter the ruling in Maleng v. Cook, 109 S. Ct. 1923 (1989), the court held that the district court was required to construe Mr. Crank's pro se habeas corpus petition liberally

as a challenge not to the 1974 conviction for which he was no longer in custody but as a challenge to the 1981 conviction for which he is still serving a sentence. The Seventh Circuit's treatment of Mr. Crank's constitutional challenge to his earlier conviction was identical to this Court's treatment of the challenge to the prior conviction in Maleng. Like this Court, the Seventh Circuit treated the challenge to the earlier conviction only as a basis for attacking the legality of the enhancement of the sentence for the second conviction. Finding that the liberally construed petition raised a proper habeas corpus challenge to the 1981 sentence Mr. Crank is currently serving, the Seventh Circuit rejected the State of Indiana's contention that the district court was without jurisdiction over his habeas corpus petition and reversed, remanding the case to the district court.

REASONS FOR DENYING THE WRIT

- I. THE SEVENTH CIRCUIT'S DECISION IS
INDISTINGUISHABLE FROM THIS COURT'S
HOLDING IN MALENG V. COOK.
-

Indiana's petition for certiorari is premised upon a fundamental misconstruction of the Seventh Circuit's holding in this case. Indiana erroneously characterizes the ruling as one holding that there is habeas corpus jurisdiction to challenge the 1974 conviction. Having made this erroneous statement, Indiana argues that the holding is in conflict with this Court's ruling in Maleng, 109 S. Ct. at

1926, that the prisoner must be in "custody" in order to challenge a conviction under title 28 U.S.C. § 2254.

Maleng involved a 1978 sentence on an assault conviction that was enhanced on the basis of a 1958 conviction for robbery. Mr. Cook's habeas corpus petition in that case listed the earlier robbery conviction as the conviction under attack, but also alleged that the robbery conviction had been used to illegally enhance the subsequent sentence for the assault. 109 S. Ct. at 1924-25. The district court had dismissed the petition for lack of subject matter jurisdiction over the earlier conviction because Mr. Cook had fully served his 1958 sentence.

The Ninth Circuit reversed, holding that even though Mr. Cook's 1958 sentence had expired, the district court had jurisdiction to consider a habeas corpus challenge to the 1958 conviction because it had been used to enhance Mr. Cook's 1978 sentence. This Court rejected the Ninth Circuit's rationale, holding that there was no habeas corpus jurisdiction over the 1958 conviction. However, this Court also held that Mr. Cook's petition should be liberally construed as a challenge to his 1978 sentence as enhanced by an allegedly invalid prior conviction. Because Mr. Cook was "in custody" for the 1978 conviction, this Court affirmed the Ninth Circuit's order remanding his habeas corpus petition for consideration by the district court. 109 S. Ct. at 1926-27.

In Mr. Crank's case, the Seventh Circuit followed Maleng and refused to authorize habeas corpus review of the 1974 conviction. Instead, it ruled that Mr. Crank's pro se petition must be liberally construed as a challenge to the 1981 conviction -- and the improper enhancement of the 1981 sentence on the basis of the earlier unconstitutional conviction. The Seventh Circuit directed the district court to determine whether the 1974 conviction is "constitutionally valid" only in order to address Mr. Crank's claim that his 1981 sentence was improperly enhanced.

Because there is no dispute that Mr. Crank is currently in custody for the 1981 conviction, there can be no claim that the district court lacks jurisdiction over a habeas corpus petition addressed to that conviction. The Seventh Circuit's decision in no way conflicts with the ruling in Maleng, 109 S. Ct. at 1926-27. Indeed, as Indiana itself concedes, this case is "factually indistinguishable" from Maleng. In Maleng, this Court also liberally construed a pro se petition for habeas corpus relief as an attack on an enhanced sentence which Mr. Cook was about to begin serving. Maleng, 109 S. Ct. at 1927.^{1/}

^{1/} Applying Maleng, Clark v. Pennsylvania, 892 F.2d 1142 (3d Cir. 1989), and Gamble v. Parsons, 898 F.2d 117 (10th Cir. 1990), also construed pro se habeas corpus petitions liberally as challenges to the later enhanced sentences, not challenges to the earlier convictions over which the court no longer had habeas corpus jurisdiction. Taylor v. Armontrout, 877 F.2d 726 (8th Cir. 1989), simply construed the petition to challenge only the earlier conviction and required refiling of the petition. None of these cases creates a conflict in the circuits. They simply involve specific
(continued...)

Because the Seventh Circuit followed Maleng to the letter, there is no basis whatsoever for granting certiorari in this case.

II. REVIEW OF THE SEVENTH CIRCUIT'S ORDER
DIRECTING THE DISTRICT COURT TO "DECIDE
WHETHER THE 1974 CONVICTION WAS
CONSTITUTIONALLY VALID" IS UNWARRANTED.

The second issue Petitioners articulate (Pet. at i), also relies on the erroneous premise that the Seventh Circuit has authorized habeas corpus review of the 1974 conviction which Mr. Crank has already served. Indiana's contention that the Seventh Circuit has created a novel standard for "habeas review of fully served and expired convictions" (id.) is patently incorrect. The Seventh Circuit has merely applied Maleng to require review of the 1981 conviction. The Seventh Circuit required the district court to evaluate whether the 1981 enhanced sentence was improperly based on an unconstitutional earlier conviction. See United States v. Tucker, 404 U.S. 443 (1972).

In its Petition for Certiorari, Indiana asserts for the first time that it will be prejudiced if it is foreclosed on remand from raising exhaustion and procedural default as to the 1981 conviction. (Pet. at 7.) However, Indiana was well aware that Mr. Crank's habeas corpus petition could be

^{1/} (...continued)
application of the rule requiring liberal construction of pro se pleadings that long antedates Maleng. See, e.g., Haines v. Kerner, 404 U.S. 519 (1972).

construed as a challenge to his 1981 conviction. Indeed, in the Seventh Circuit, this was a central issue. (See Brief of Respondents-Appellees at 6.) Nevertheless, Petitioners failed to raise any concrete exhaustion challenge to the 1981 conviction and did not even mention procedural default in that context.^{2/}

In addition, even before this Court, Petitioners have still failed to raise any concrete objection regarding exhaustion or procedural default in their Petition for Writ of Certiorari, waiving these issues.^{3/}

There is no basis for granting certiorari in this case. Indiana's Petition relies upon a misconstruction of the Seventh Circuit's ruling and asserts speculative issues which the State has failed to preserve.

^{2/} Nor did Petitioners give any indication of their current concern that Mr. Crank might have inadvertently waived some claim if his petition is construed as a challenge to the 1981 conviction. (Pet. at 5.) This speculative challenge is, of course, one which Indiana may not raise.

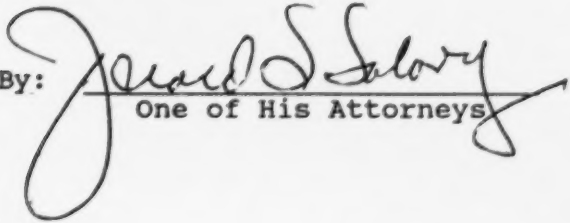
^{3/} Moreover, the record itself establishes that Mr. Crank has exhausted all of the remedies available from the State of Indiana. The trial court denied Mr. Crank the right to effect a direct appeal of his 1981 conviction. Crank v. State, 502 N.E.2d 1355, 1357 (Ind. App. 2d Dist. 1987). On April 24, 1984, Mr. Crank filed for post-conviction relief at the trial court level, contending that the trial court had erred in precluding him from directly appealing his cause, but on August 1, 1985 his petition was denied. Id. Mr. Crank appealed the trial court's denial of his petition for post-conviction relief. Id. On January 29, 1987 the appellate court affirmed the trial court's ruling. Id. at 1360. Finally, Mr. Crank petitioned the Indiana Supreme Court to hear his case. His motion to transfer his case to that court was denied on August 23, 1988. Mr. Crank has no pursuable remedy in state court regarding his 1981 conviction; he has satisfied the habeas corpus prerequisite of exhaustion as that standard was articulated by this Court in Rose v. Lundy, 455 U.S. 509, 518-520 (1982).

CONCLUSION

For all of the reasons stated above, this Court should deny the State's Petition for Certiorari in this case.

Respectfully submitted,

WILLIAM E. CRANK

By: 
One of His Attorneys

Dated: November 21, 1990

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(01101.BRF)

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CERTIFICATE OF SERVICE

I, Lauren S. Ruby, an attorney with the law firm of Jenner & Block, hereby certify that on the 21st day of November, 1990, one copy of Respondent's Brief in Opposition to Petition for Certiorari in the above-captioned case was served by United States Mail, postage prepaid, to:

David A. Nowak
Deputy Attorney General
219 State House
Indianapolis, Indiana 46204

I further certify that all parties required to be served have been served.

Respectfully submitted,

Lauren S. Ruby
Lauren S. Ruby
Counsel for Respondent